The Great Atlantic & Pacific Tea Co., Inc. *and* Retail Clerks Union, Local 204, affiliated with United Food and Commercial Workers International Union, AFL-CLC-CIO. Case 11-CA-9473.

February 25, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On September 18, 1981, Administrative Law Judge Harold Bernard, Jr., issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief, and Respondent filed cross-exceptions and a brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions[2] of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] We find it unnecessary to pass on the Administrative Law Judge's conclusion that the General Counsel failed initially "to make out a *prima facie* case of unlawful discharge," since we conclude that the General Counsel has ultimately failed to establish by a preponderance of the relevant evidence that Respondent was motivated by unlawful considerations in its discharge of employee Blanche Matthews.

DECISION

STATEMENT OF THE CASE

HAROLD BERNARD, JR., Administrative Law Judge: This case was heard before me on August 13 and 14, 1981, in Plymouth, North Carolina, pursuant to a complaint issued December 4, 1980, alleging that Respondent discharged Blanche A. Matthews because she supported the Union, thereby violating Section 8(a)(3) of the Act. Respondent's answer denies any violation of the Act.

Based upon the entire record, including the demeanor of the witnesses and the brief filed by Respondent, I make the following:

FINDINGS OF FACT

I. JURISDICTION

The Respondent, The Great Atlantic & Pacific Tea Co., Inc., is a Maryland corporation engaged in retail sales of groceries from, among other locations, a retail store located in Plymouth, North Carolina. Respondent annually sells goods valued in excess of $500,000, and annually receives goods valued in excess of $50,000 directly from points outside the State of North Carolina. I find that Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act. The Union, Retail Clerks Union, Local 204, affiliated with United Food and Commercial Workers International Union, AFL-CIO, CLC, concededly is a labor organization within the meaning of Section 2(6) and (7) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICE

Blanche Matthews began work at Respondent's Plymouth, North Carolina, grocery store 12 years ago, and performed cashier duties mainly, until notified expressly that she was discharged on May 27, 1980, because of discrepancies in her cash register receipts.

Some time in September 1979, the Union contacted Matthews, who agreed to help organize employees in the store, pursuant to which Matthews held one meeting at her home the following October. Four or five employees out of 15 employees on her shift (and out of about 35 total employees at the Plymouth store) attended. Matthews also talked to employees on and off store premises concerning union benefits and handed out authorization cards off the premises on an undisclosed number of occasions involving an unidentified number of employees.

Respondent was aware of Matthews' activities, as evidenced by testimony from agreed supervisor and agent of Respondent, Store Manager Ronald Dunlow, that there were a lot of rumors that Matthews was having meetings with the Union. In addition, there is undenied testimony by employees Warren Downing and Diane Downing that Earnest Willoughby, store manager until January 1980, told each during separate talks in November and December 1979 that Matthews would be the shop steward for the Union.[1] In November, while pickets from a Durham, North Carolina, location were outside the store, Matthews testified that a bagboy, in the presence of a company official, asked her why, if she were so "for it" (the Union), she was not walking with the pickets. Combining this testimony with the fact that the entire employee force numbered only 35 employees in a small town where knowledge of newsworthy events

[1] Willoughby referred to Matthews, according to Warren Downing, as a "troublemaker," but, because it is clear Matthews had been considered by management well before the union efforts to be a "complainer" about her shift schedule, part-time status, and other matters connected with her work, there is no clear basis to conclude Willoughby was referring to union activities as the basis for the term "troublemaker."

travels far and fast, I conclude it reasonable to find that Respondent had knowledge concerning Matthews' conduct.

There is however, no evidence that Respondent harbored animosity towards Matthews because of her union activities, unless, as will be discussed further, such can be inferred from the circumstances surrounding her discharge.

This does not mean Respondent welcomed union organization. Matthews testified by way of background only, the event occurring in November 1979, thus well outside the period of limitations prescribed by Section 10(b) of the Act, that Willoughby once told her the Union "stirred things up," would do no good and that employees in effect would be paying for their own insurance plans via the union dues. Further, employee Hal Beasley, Jr., testified that manager Dunlow, sometime in mid-October 1979[2] told him there was a "little activity going on" and that the "Union won't do you any good."

III. THE CAUSE FOR DISCHARGE

Respondent operates 120 stores in the so-called Carolina Group alone (there are some 8 or 9 such groups in the United States). The Carolina Group covers North and South Carolina. Forty-seven stores are union; employees in the 73 remaining stores are unrepresented—there being a combined total number of employees in all stores of 3,500.

Jack Royal, assistant personnel director for the Carolina Group testified credibly that prior to 1977, there was no written company policy regarding cash register shortages. In October 1977, a written policy emerged containing three steps: notice or warning; suspension; and for a third infraction within 6 months, termination. Admittedly, there was loose enforcement of this policy groupwide; indeed, Matthews was the benefactor herself (among others) of Respondent's laxity in this regard. Dissatisfied with its own policy and its implementation, Respondent was receptive towards union efforts to raise problems with it prior to negotiations in October 1979 and devised a new one, implemented on November 29, 1979. From then on, the new policy, which was applied groupwide, was to include *two notices or warnings*, then a suspension, then discharge for cash register discrepancies incurred by cashiers. A further new wrinkle was that enforcement was considerably assured by placing responsibility heavily on the shoulders of store management hithertobefore at least partially responsible for the old problems. The policy was posted and made known to all employees, who, under its terms, were to have "clean slates," prior infractions being expressly excluded. The record leaves no room for doubt that this new policy, including a more strict approach to enforcement was a groupwide solution to an important groupwide problem.

From the time the new policy was implemented November 29, 1979, an occurrence which is neither alleged nor emerges as being a result of Matthews' union activities earlier, until her discharge on April 12, 1980, some 5 months later, Matthews received six warnings for policy violations. On January 6, 1980, Matthews received her first warning for a shortage of $9.88; on January 10, a second warning for another discrepancy of $6.28; and after a third discrepancy on March 8, consisting of a shortage of $39.58, she was given a 3-day suspension. On April 7, Matthews was given a fourth warning for a shortage of $9. Between the time Royal was considering or acting on a decision to discharge Matthews for her fourth violation and her actual discharge, *viz* on April 10 and 12, Matthews received warnings numbered five and six.

This total does *not* include two additional incidents which on their face could have been reasonably *considered* as violations but which Respondent excused in one case on January 22 invalidating the warning because arguably the cash discrepancy *could* have arisen from a malfunctioning cash register used by Matthews; and in another incident in early April involving the possibility that Matthews was given incorrect change for a large bill, giving her the benefit of the doubt and not issuing any warning. These two examples of leniency or reasonableness manifest no haste or desire to separate an unwanted union adherent at the first opportunity.

It is also clear that Respondent applied its policy, including the fourth step, to other employees as well as Matthews, including employees with 15 years of service, Hazel Earley, 6 years of service, Elizabeth Williams, and six other employees also throughout the Group, who were, under the policy, also fired in 1981 for the cash register discrepancies, not alleged to be in connection with any union activities on their part.

In addition to such evidence that Respondent followed its policy outside the Plymouth store, the record further demonstrates that as of January 3, 1981, 15 Plymouth store employees had received warnings for cash register discrepancies, three of whom incurred suspensions. Hence it is certain that there is no disparity in Respondent's application of this policy upon which it can be inferred that Matthews was being singled out for retaliatory conduct.

Royal credibly testified further that Dunlow called him, informing him there was a fourth notice on Matthews, and that he subsequently reviewed the warnings and recommended her discharge to his superior, Patrick Cronin. The decision was to "let" her complete her vacation and use all her sick leave at the hospital, considering her length of time with the company and then discharge her. He denied knowledge of Matthews' union activity or that he had discussed such with Cronin, or that it had anything to do with Respondent's action.

The General Counsel relies heavily in this proceeding on the contention that it is simply "incredible" that Matthews could accumulate so numerous an amount of warnings from November 1979 until her discharge in April 1980 (seven if one includes the later invalidated one) considering that in all the prior years she merely had two warnings for cash shortages (and four others for other infractions as well, it should be noted). But the General Counsel can draw no nourishment from this argument. In the first place, there was no written policy at

[2] Although Beasley had, when first describing the occurrence generally, placed it in 1980, counsel corrected Beasley and twice placed the year as 1979 without objection by the witness when I expressly asked for the correct date on which the conversation occurred.

all before 1977 concerning cash register discrepancies and there was no evidence presented one way or the other regarding Matthews' performance in such period so that no comparison at all can reliably be drawn between her pre-1977 employment performance and such performance subsequent to the new policy's implementation in November 1979. Furthermore, there was uncontradicted testimony that during the "loose" enforcement of the "old" policy from October 1977 until November 1979, many instances of discrepancies, including the ones involving Matthews, arose and did not result in written warnings, again denying the General Counsel an accurate base to compare Matthews' pre- and post- new-policy performance regarding cash discrepancies.

The General Counsel also urges that no training was provided to Matthews (an employee with 12 years' experience), as provided under the new policy, even though she requested it, and in cross-examination, made much of the question whether Matthews had ever been counseled, also a provision in the policy. I think it clear that Matthews was shown the areas where improvement was needed by management on more than one occasion—the counting of her register receipts at each transaction—once to herself and once to the customer—only to reply that such a procedure was "silly." Moreover, it is clear from the credible testimony that there was no "training" denied Matthews because no "training" as such was provided by Respondent to experienced cashiers regardless of their performance, the term training being intended in the policy to be embraced by the term counseling, in short to connote what management gave Matthews in this case—advice on how to improve—which she apparently rejected.

As further support for arguing Matthews' performance must be deemed "incredible," hence one assumes, suspicious, the General Counsel points out the large number of repair visits by NCR (National Cash Register Company) to correct registers at the Plymouth store, and that cash bags were left unattended on occasion in the office. However, as has already been noted, Respondent demonstrated a reasonable attitude towards Matthews, invalidating one warning because her register as reported by NCR "could" have caused the error, and on another occasion, excluding writeup or warning entirely because Matthews "might" had been shortchanged. There is simply no probative evidence whatsoever to find either that the number of infractions by Matthews is incredible *or* were manufactured by Respondent or indeed, that such resulted from *any* other source than Matthews herself.

For the General Counsel to adduce testimony from Matthews that there was a general "looseness" in procedures such that Respondent could not have accurately attributed the errors for which she received warnings to Matthews misses the mark, for it was the General Counsel who had the burden of providing by a preponderance of *evidence*, not unsupported speculation, that Respondent could not have reasonably relied upon Matthews' own cash register balance sheets which showed the errors, and this he did not, or could not do. In any event, there was no showing that Matthews was ever prohibited from being present at the count of receipts and Respondent submitted evidence tending to show it made reasonable efforts to exclude possibilities of error arising or being caused by sources other than cashiers themselves.

On the other hand, there is ample cause advanced by Respondent for discharging Matthews and contained in this record by way of background *viz* her prior record and relationship with Respondent's supervision to justify such action so as to exclude any basis to infer an unlawful motive. Matthews was discharged pursuant to a legitimately implemented and uniformly administered policy.

Accordingly, I conclude that the General Counsel has failed to make out a *prima facie* case of unlawful discharge. *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980).

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(6) and (7) of the Act.
3. Respondent did not violate Section 8(a)(1) of the Act.
4. Respondent did not violate Section 8(a)(1) and (3) of the Act by discharging Blanche A. Matthews.

Upon the foregoing findings of fact, conclusions of law, and the entire record in this case, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[3]

It is hereby ordered that the complaint be, and it hereby is, dismissed in its entirety.

[3] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.